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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 344

F. L. MENDEZ & COMPANY,
Petitioner and Appellant,
vs.
GENERAL MOTORS CORPORATION,
Respondent and Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

I.

SUMMARY STATEMENT OF MATTERS INVOLVED.

Your petitioner, respectfully showing that it is a corporation existing under the laws of the State of Indiana, (R. 1) prays this court for the issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review a final judgment of said Circuit Court affirming a judgment of the District Court for the Northern District of Indiana, South Bend Division, entered on the 2nd day of July, 1946. (R. 53.) Said final judgment

of the Circuit Court of Appeals was rendered on the 8th day of May, 1947, and petition for rehearing was denied on the 12th day of June, 1947.

This is an action to recover treble damages pursuant to provisions of Section 4 of the Clayton Act (Title 15, Section 15 of the United States Code) alleging that the respondent violated Section 3 of the Clayton Act (Title 15, Section 14 of the United States Code). The respondent filed a motion to dismiss or, in the alternative, for summary judgment pursuant to Rule 56(b) of the Rules of Civil Procedure, and attached to its motion an affidavit containing six exhibits, to-wit: Petitioner's second amended complaint in civil cause No. 472, being Exhibit "A"; the answer of respondent to petitioner's second amended complaint in civil cause No. 472, being Exhibit "B"; the verdict of the jury, being Exhibit "C"; the order of the court on said verdict, being Exhibit "D"; the court's charge to the jury, being Exhibit "E"; and the complaint in this cause, being Exhibit "F". The motion of the respondent was based on the theory that a judgment in its favor in a former suit brought by the petitioner against the respondent and General Motors Acceptance Corporation of Indiana adjudicated the issues involved in this second suit and that the cause of action in the two suits were the same.

The question presented for the trial court and the Circuit Court of Appeals was: Does an adjudication in favor of defendant on a complaint for treble damages under Section 1 of the Sherman Act (Title 15, Section 1, of the United States Code) alleging injury to petitioner because of a conspiracy effectuated against petitioner preclude and bar a second suit by petitioner for treble damages under Section 3 of the Clayton Act (Title 15, Section 14, of the United States Code) alleging injury by reason of the imposition of conditions that petitioner not take on a

competitive product? Both the trial court and the Circuit Court of Appeals held that only one cause of action was involved in both suits and, in the second suit, merely an additional ground was alleged to sustain the same cause of action as stated in the first suit. Therefore, applying the doctrine of *res judicata,* the second suit was held barred.

Petitioner's complaint in its first suit (R. 11-20) alleged the respondent and others entered into a conspiracy existing on the 7th day of April, 1937, and for a long time prior thereto (R. 14) to force petitioner to finance through General Motors Acceptance Corporation of Indiana and enumerated certain specific acts done by the respondent and others to effectuate the said conspiracy. (R. 14-18.) Petitioner further alleged that as a result of such conspiracy it was damaged. (R. 19.) The respondent denied the existence of said conspiracy and claimed that no damage had resulted to petitioner as a result of any conspiracy. At the trial, respondent further contended that the reason it had cancelled petitioner's Pontiac motor franchise was because petitioner had taken the Packard franchise, a car competitive with those produced by respondent. (R. 38.) The court refused to instruct the jury, even though requested by petitioner, that if petitioner's franchise was cancelled because it had taken on a competitive product, it was a violation of the anti-trust laws and should be considered by the jury in determining the validity of the defense. (R. 52-53.)

Plaintiff's complaint in its second suit alleged that respondent imposed as a condition to granting a Pontiac franchise that plaintiff not sell a competitive product; that plaintiff took on a competitive product, namely, Packard; that respondent cancelled plaintiff's Pontiac franchise, resulting in damage to plaintiff; all in violation of the Clayton Act.

REASONS FOR ALLOWANCE OF THE WRIT.

1. The decision of the Circuit Court of Appeals that actions brought under Section 1 of the Sherman Act (Title 15, Section 1 of the United States Code) and Section 3 of the Clayton Act (Title 15, Section 14, of the United States Code) are one and the same cause of action is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case of *Buckeye Powder Company* v. *E. I. DuPont de Nemours Powder Company,* 223 Fed. 881.

2. The decision of the Circuit Court of Appeals that actions brought under Section 1 of the Sherman Act (Title 15, Section 1, of the United States Code) and Section 3 of the Clayton Act (Title 15, Section 14, of the United States Code) are one and the same cause of action is a decision on a Federal question in conflict with the applicable decisions of this Court.

3. The great importance of the anti-trust laws to the business world requires an authoritative and elucidating decision on the issue involved.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this court directed to the Circuit Court of Appeals for the Seventh Circuit commanding said Court to certify and send to this court a full and complete transcript of the record and the proceedings of said Circuit Court of Appeals for the Seventh Circuit had in the case numbered and entitled on its docket No. 9200, F. L. Mendez and Company, Appellant, *vs.* General Motors Corporation, Appellee, to the end that this cause may be reviewed and determined by this court as provided for

by the Statutes of the United States; and that the judgment herein of said Circuit Court of Appeals for the Seventh Circuit be reviewed by the court and for such further relief as to this court may seem proper.

Dated this 9th day of September, 1947.

Arthur Lucius Hubbard

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OCTOBER TERM, 1947.

No. .....

F. L. MENDEZ & COMPANY,
Petitioner and Appellant,

vs.

GENERAL MOTORS CORPORATION,
Respondent and Appellee.

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Seventh Circuit is reported in 161 Fed. (2d) 695 and in record page 64.

II.

JURISDICTION.

1. The date of the judgment that is sought to be reviewed is June 12, 1947.

2. The statutes which are believed to sustain the jurisdiction of this Court is Title 28 of the United States Code, Section 350 (43 Stat. 940 as amended February 13, 1925) and Title 15, Section 15, of the United States Code (38 Stat. 731, Section 4).

III.

STATEMENT OF THE CASE.

This has already been stated in the preceding petition under page 1, which is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS.

Point A.

The conclusion of the Seventh Circuit that Section 1 of the Sherman Act and Section 14 of the Clayton Act provide only one cause of action with different grounds and not two causes of action is in conflict with the decision of the Third Circuit in the case of *Buckeye Powder Company* v. *E. I. DuPont de Nemours Powder Company*, 223 Fed. 881.

POINT B.

The Circuit Court of Appeals erred in determining that the decision of this court in the case of the *United Shoe Machine Company* v. *The United States*, 250 U. S. 451, and in the case of *Standard Fashion Company* v. *Magrane-Houston Company*, 258 U. S. 346, were not determinative of this question.

POINT C.

The Circuit Court erred in its application of the rule *res judicata*, which holding will severely handicap the effective enforcement of the anti-trust laws of the United States and a determinative ruling of this court is necessary.

V.

ARGUMENT.

Summary of the Argument.

POINT A.

The Third Circuit had previously determined that the Clayton Act and the Sherman Act stated different civil causes of action.

POINT B.

This court has determined that the Clayton Act and the Sherman Act state different causes of action.

POINT C.

The rule of the Circuit Court makes effective enforcement of the anti-trust laws by civil action almost impossible and encourages monopoly.

A.

The Circuit Court of Appeals for the Third Circuit in the case of *Buckeye Powder Company* v. *E. I. DuPont de Nemours Powder Company*, 223 Fed. 881, where appellant complained of the trial court's requirement that it elect which counts it would insist on before the jury, the Court said at page 887:

> "* * * that a declaration in a similar suit under the same section was bad for duplicity because it combined two causes of action in one count * * *."

The Court said at page 886:

> "The question of duplicity was thus raised at an early stage, and as a result of that decision an

amended declaration was afterwards filed. But this also contained only one count, and as Judge Lanning (sitting in the Circuit Court for the District of New Jersey) had already decided in *Rice* v. *Standard Oil Co.*, (C. C.) 134 Fed. 464, that a declaration in a similar suit under the same section was bad for duplicity because it combined two causes of action in one count, we think the trial judge was sufficiently justified in requiring the plaintiff to elect."

The Third Circuit Court had clearly indicated that the respective counts clearly and explicity set forth separate causes of action. Thus, the holding of the Seventh Circuit that actions brought under the Clayton Act and the Sherman Act state the same causes of action is clearly and irrevocably in conflict with the decision of the Third Circuit. The Court in its opinion failed to consider this factor at all and did not distinguish this case.

B.

This Court has clearly in the case of *United Shoe Machine Company* v. *The United States,* 258 U. S. 451, held that the Sherman Act and the Clayton Act do not state the same cause of action. This Court in answering the contention of the appellant in the above cited case that the action was *res judicata* at page 460 answered:

"The cause of action is, therefore, not the same."

The Circuit Court of Appeals for the Seventh Circuit has sought to distinguish the holding of this Court in the above cited case on the basis that the decision therein was applicable only to the Government and not to private litigants. Yet this court had the opportunity to make such a distinction and refused to do so. This Court rejected the Circuit Court of Appeals' opinion on the ground that the doctrine of *res judicata* was not available to the Govern-

ment or that the Government had a different status than that of a private litigant. Rather, this Court relied on the case of the *Standard Fashion Company* v. *Magrane-Houston Company,* 250 U. S. 346, a civil action wherein the court determined that the Sherman Anti-Trust Law and the Clayton Act stated two different causes of action.

Petitioner feels that the decision of the Seventh Circuit is clearly in conflict with the above decided decisions of this Court.

C.

If the rule established by the Seventh Circuit Court of Appeals is to prevail, then, one of the most effective means of enforcing anti-trust laws of the United States has been abolished by court decision. Congress in enacting the Clayton Act, and specifically Section 4 thereof providing for the recovery of treble damages and attorney's fees, encouraged civil enforcement as the Congress recognized that enforcement of the anti-trust laws in order to be effective must depend upon civil actions. This is particularly true today when business has grown to its present size and with the increased danger of monopolies resulting in higher prices and limited production. The present case illustrates the danger of the rule promulgated by the Seventh Circuit. Petitioner, in filing its original action, presumed that the respondent acted in the manner that it did to petitioner's detriment because of the existing conspiracy. Petitioner's belief was heightened by the fact that a criminal action brought by the Government was successfully concluded against the respondent and others in the same Court in which Petitioner filed its action and in which an officer of the petitioner was a witness on behalf of the Government as to the existence of the conspiracy charged. (R. 32.) It was not until the last witness in

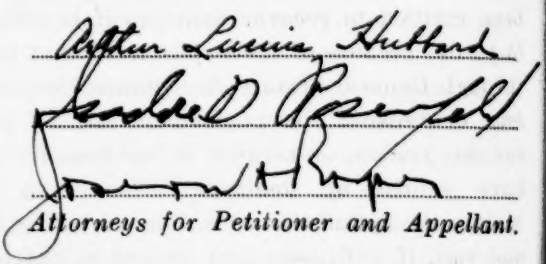
chief in the first suit that any evidence whatsoever was introduced as to the cause of the petitioner's cancellation.

The rule as established by the Seventh Circuit additionally errs to the detriment of civil enforcement of the anti-trust laws in that where the damages may differ in the two actions, the Seventh Circuit has refused to recognize this distinction. In the first action, the petitioner's allegation of damages was based on the impact of the conspiracy against him; whereas, in the second suit, the petitioner's allegation of damages is based on losses resulting because of the prohibition from handling a competitive car. To illustrate, petitioner, without amending or in any respect changing the allegations of its first complaint, would have been entitled to recover damages if it could show that it lost sales because of the requirement that cars be financed through General Motors Acceptance Corporation of Indiana, or because the respondent refused to deliver cars for this reason, or because it lost benefits which it would have gained by financing other than with General Motors Acceptance Corporation of Indiana. In the second suit, if petitioner had elected to cancel the Packard franchise, then, he could have recovered damages for the failure to make sales of Packard automobiles, which sales were made impossible by the acts of the respondent. It is essential to the proper enforcement of the anti-trust laws that the business world be advised as to what rights exist thereunder. Thus, as in this case, where there is existent a franchise agreement giving to respondent the right to cancel without cause and without reason (R. 30-31), must a party who has every reason to believe that such cancellation was based upon an illegal act, which information is exclusively within the control of the wrongful party, give at his peril why and what sections of the anti-trust laws have been violated? The holding of the Seventh Circuit

in effect means that every individual guilty of violating the anti-trust laws will state: "No, we did not violate the provisions which you contend but rather violated other provisions" and as a result escape free of damages for their wrongful acts! Such a rule will make the enforcement of the anti-trust laws by civil action impossible.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.



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Respondent-Appellee.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT-APPELLEE IN OPPOSITION.

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October 6, 1947.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT-APPELLEE IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court rendered in connection with the entry of its order dismissing the complaint herein is unreported.* The opinions of the Circuit Court of Appeals are reported in 161 F. (2d) 695 and printed in the record at pages 64 and 82.

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* Because this opinion was omitted from the record herein as prepared by petitioner, it is printed as an appendix to this brief.

JURISDICTION.

1. The judgment of the Circuit Court of Appeals of which review is sought by the petition herein was entered June 12, 1947.

2. The controversy herein arises under Title 15, Section 15 of the United States Code (Oct. 15, 1914, c. 323, § 4, 38 Stat. 731) and the provisions of Section 350 of Title 28 of the United States Code (R. S. § 1008; Mar. 3, 1891, c. 517, § 6, 26 Stat. 828; Sept. 6, 1916, c. 448, § 6, 39 Stat. 727; Feb. 13, 1925, c. 229, § 8 (a, b, d), 43 Stat. 940).

QUESTION PRESENTED.

Petitioner states the issue in extreme generalities as whether an adjudication in a defendant's favor on a complaint under Section 1 of the Sherman Act bars a second suit by the same plaintiff under Section 3 of the Clayton Act (Petition, pp. 2-3). The fact is, however, that petitioner's suits under the two statutes allege that the same interest of petitioner was invaded by the same act, and only the reasons why the act is claimed to be unlawful differ. The question presented therefore is:

> Whether an automobile dealer who sues for damages resulting from a cancellation of his franchise on the ground that the cancellation was illegal because pursuant to a conspiracy violative of Section 1 of the Sherman Act (Title 15, Section 1, U.S.C.), and who loses a suit against the manufacturer for that cancellation (pursuant to jury verdict), is thereafter barred by *res judicata* from maintaining a second suit against the same defendants for the same damages resulting from the same cancellation, which second suit differs from the first only in that the cancellation is claimed to be illegal as violative of a different statute, Section 3 of the Clayton Act (Title 15, Section 15, U.S.C.).

STATUTES INVOLVED.

Section 4 of the Clayton Act, Title 15, U.S.C., Section 15 (Oct. 15, 1914, c. 323, § 4, 38 Stat. 731):

> "§ 15. Suits by persons injured; amount of recovery.
>
> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 3 of the Clayton Act, Title 15, U.S.C., Section 14 (Oct. 15, 1914, c. 323, § 3, 38 Stat. 731):

> "§ 14. Sale, etc., on agreement not to use goods of competitor.
>
> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Section 1 of the Sherman Anti-Trust Law, Title 15, U.S.C., Section 1 (July 2, 1890, 26 Stat. 209):

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *"

STATEMENT.

This is an action to recover treble damages under the provisions of Section 4 of the Clayton Act, Title 15, U.S.C., Section 15, for alleged injury done to petitioner's business or property by respondent as the result of a violation by the latter of Section 3 of the Clayton Act, Title 15, U.S.C., Section 14.

Respondent moved to dismiss the complaint herein or alternatively for summary judgment under Rule 56 (b) of the Federal Rules of Civil Procedure on the ground that the instant action was barred under the doctrine of *res judicata* by a judgment on the merits entered in its favor upon the verdict of a jury in a previous action brought by the petitioner herein for treble damages under Title 15, U.S.C., Section 15, alleging the same injury to its same business or property by this respondent and others in the course of a conspiracy to restrain interstate commerce in violation of Section 1 of the Sherman Anti-trust Law (Title 15, U.S.C., Sec. 1). The motion papers consisted of one affidavit to which were attached copies of the pleadings in the previous case and certified copies of the jury's verdict, of the judgment entered thereon and of the court's charge to the jury in the earlier litigation.

The trial court held that the cause of action sued upon herein was identical with the cause of action asserted in the prior litigation unsuccessfully pursued by the peti-

tioner and therefore dismissed the complaint. On appeal the Circuit Court of Appeals unanimously affirmed the judgment of the District Court. Two opinions were written by the Circuit Court of Appeals, one upon the original submission and the second upon the denial of a rehearing.

As the sole issue here presented is whether the prior adjudication operates as *res judicata* with respect to this case, we believe it will facilitate the Court's understanding to print in parallel columns a summary of the complaints in the two cases:

Present Complaint.	*Complaint in Prior Suit.*
1. The action is brought under Section 15 of Title 15 of the United States Code. (Complaint, par. 6, Rec. p. 2.)	1. The action is brought under Section 15 of Title 15 of the United States Code. (Amended complaint, par. 9, Rec. p. 13.)
2. Plaintiff, for more than five years prior to July 9th, 1937, was the owner of a certain business and property, consisting of an automobile dealership at South Bend, Indiana, including among its assets a franchise agreement made with General Motors Sales Corporation, a wholly owned subsidiary of defendant, entitling it to purchase from said subsidiary of defendant Pontiac automobiles and to resell them to the public in South Bend and vicinity. (Complaint, par. 8, Rec. p. 3.)	2. Plaintiff, for more than five years prior to July 9th, 1937, was the owner of a certain business and property, consisting of an automobile dealership at South Bend, Indiana, including among its assets a franchise agreement made with General Motors Sales Corporation, a wholly owned subsidiary of defendant entitling it to purchase from said subsidiary of defendant Pontiac automobiles and to resell them to the public in South Bend and vicinity. (Amended complaint, par. 11, Rec. p. 13.)*

* The complaint in the first suit sought relief for injury to plaintiff's business as a Buick dealer and also as a Pontiac dealer. However, when the case was submitted to the jury, the only ques-

3. Said franchise agreement contained a cancellation clause by which defendant reserved the right to cancel said franchise on short notice. (Complaint, par. 9, Rec. p. 3.)

4. That on or about the 7th day of April, 1937, the defendant, through its subsidiary General Motors Sales Corporation, cancelled said Pontiac franchise agreement, effective July 9th, 1937. (Complaint, par. 22, Rec. p. 6.)

5. That said cancellation was illegal under the provisions of Section 14 of Title 15 of the United States Code in that the cancellation was occasioned by the fact that on April 1st, 1937, the plaintiff had entered into an agreement with Packard Motor Car Company, a competitor of defendant, whereby plaintiff became an authorized Packard dealer, although plaintiff's Pontiac

3. Said franchise agreement contained a cancellation clause by which defendants reserved the right to cancel said franchise on short notice. (Amended complaint, par. 12(3), Rec. p. 14.)

4. That on or about the 7th day of April, 1937, the defendant, through its subsidiary General Motors Sales Corporation, cancelled the said Pontiac franchise agreement. (Amended complaint, par. 4, Rec. p. 19.)

5. That said cancellation was illegal in that the said cancellation was made pursuant to and part of a conspiracy in restraint of the interstate trade in General Motors automobiles (in violation of Section 1 of the Sherman Anti-Trust law), the object of which conspiracy was to monopolize and control to the greatest extent possible, and to the exclusion of all other per-

---

tion submitted concerned the cancellation of the Pontiac franchise. This is apparent from the following extracts from the charge of the trial judge (Rec. pp. 37, 38):

> "The Plaintiff in this case seeks the recovery of damages because of the cancellation of its Pontiac franchise in April, 1937. * * *
>
> "Plaintiff is claiming no damages because of the termination of its Buick franchise in September, 1936, and you can allow no damages to Plaintiff because of the cancellation of the Buick franchise."

agreement contained no provision prohibiting it from acting as a dealer in other competitive lines of automobiles. (Complaint, pars. 23, 24, 25, Rec. p. 6.)

6. That said cancellation injured the plaintiff in its business and property in the sum of $200,000. (Complaint, par. 26, Rec. pp. 6-7.)

sons and corporations, the business of financing the trade and commerce of various automobiles including Pontiac automobiles. (Amended complaint, pars. 13, 14, Rec. pp. 18-19.)

6. That said cancellation injured the plaintiff in its business and property in the amount of $140,000. (Amended complaint, par. 15, Rec. pp. 10, 19.)

ARGUMENT.

I.

THE DECISIONS BELOW WERE CORRECT.

Petitioner's contentions are without merit and disclose a misconception as to the application of *res judicata*. In the application of that legal doctrine there is always involved the definition of the term "cause of action," which at times has been used loosely or perhaps erroneously to mean different things in different contexts. In *U. S. v. Memphis Cotton Oil Co.*, 288 U. S. 62, 67, Mr. Justice Cardozo stated:

> "A 'cause of action' may mean one thing for one purpose and something different for another. It may mean one thing when the question is whether it is good upon demurrer, and something different when there is a question of the amendment of a pleading or of the application of the principle of *res judicata*."

That the term "cause of action" as used in the application of the doctrine of *res judicata* means a single invasion of a single primary right is established by this Court's decision in *Baltimore S. S. Co. v. Phillips*, 274 U. S. 316. That case involved a second attempt to recover for personal injuries. In the earlier suit the negligence asserted was in the use by defendant of defective appliances. In the second case the ground for recovery asserted was the negligent operation of the appliances. This Court held that the cause of action was identical in both suits and that the second suit was barred because there had been a single invasion of the same primary right asserted in both cases. The Court said (p. 321):

> "Upon principle, it is perfectly plain that the respondent suffered but one actionable wrong and was

entitled to but one recovery, whether his injury was due to one or the other of several distinct acts of alleged negligence or to a combination of some or all of them. In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex."

Other cases which have laid down and applied the identical doctrine are:

United States v. *California & Ore. Land Co.*, 192 U. S. 355.

Werlein v. *New Orleans*, 177 U. S. 390.

Vinson v. *Graham*, 44 F. (2d) 772.

Pavelka v. *St. Albert Society*, 82 Conn. 146, 72 Atl. 725, a case in which the facts are closely analogous to the case at bar.

The summary of the two complaints provided at pages 6 to 8 of this brief demonstrates that both relate to a single cause of action. In both plaintiff (now petitioner) claimed:

(1) On July 9, 1937, it was the owner of a Pontiac franchise at South Bend, Indiana.

(2) On April 7, 1937, defendant (now respondent) wrongfully cancelled said franchise, effective July 9, 1937.

(3) Said cancellation injured plaintiff.

In both actions the primary right involved was the right to be secure in its business or property, namely, its Pontiac franchise. The invasion of that right claimed in each case was identical, *viz.*, the wrongful cancellation of that franchise by defendant. Only one distinction is to be found between the two cases, *viz.*, the reason for claiming the invasion (cancellation) to be wrongful.

In the first case the cancellation was asserted to be

wrongful because it was pursuant to a violation by respondent of Section 1 of the Sherman Anti-Trust Law. Here the petitioner claims the cancellation to be wrongful because it is pursuant to a violation by respondent of Section 3 of the Clayton Act. Under these circumstances, the application of *res judicata* is clearer than in *Baltimore S. S. Co.* v. *Phillips, supra,* where this Court held a second action barred even if the injury resulted from different acts, so long as the plaintiff claimed the same injury to the same primary right. Here even the act alleged is the same, and only the reason why the act is claimed to be illegal differs. Under the decisions of this Court, this difference does not mean that a different cause of action is involved. See also *Pavelka* v. *St. Albert Society,* 82 Conn. 146, 72 Atl. 725, where the Court said:

> "In the present action the plaintiff sets out as establishing and defining his primary right the fact of his membership in the defendant society, and its character as a benefit organization. *Grand Lodge* v. *Grand Lodge,* 81 Conn. 189, 205, 70 Atl. 617. The defendant's delict by which, as is charged, this right was invaded, is alleged to have been the plaintiff's wrongful exclusion from that membership. The primary right set out in the complaint in the former action was identically the same, and the delict charged against the defendant was the same. The wrong complained of in both actions was the act of wrongful expulsion, and it was the same act in both cases. The two complaints do not differ, except that in the former the reason for the wrongfulness of the expulsion is specified as want of notice; while in the present it is said to arise from other informalities in the proceedings which resulted in it. The essential fact constituting the charged delict was the wrongful expulsion from membership. Its wrongfulness might result from a sufficient single cause or from a concurrence of causes, each sufficient in itself. However this might be, the essential thing necessary to perfect a right of action would be the

wrongful character of the act of expulsion. The conditions creating that character would be only incidental facts evidential of the principal fact upon which alone the plaintiff could rely, and upon which in both cases he did rely."

II.

THE PETITION PRESENTS NO CONFLICT BETWEEN THE DECISION BELOW AND OTHERS.

Petitioner first urges that certiorari be granted because of a supposed conflict between the decision below and the decision of the Circuit Court of Appeals for the Third Circuit in *Buckeye Powder Co.* v. *E. I. du Pont de Nemours P. Co.*, 223 Fed. 881.

The supposed conflict between the circuits is entirely imaginary. The *Buckeye case* did not involve the doctrine of *res judicata*. It reviewed the action of a trial court in ordering a plaintiff in a triple damage anti-trust suit to elect whether he would go to the jury on the theory that defendant's conduct violated Section 1 or Section 2 of the Sherman Act. The Circuit Court of Appeals noted that practically all the plaintiff's evidence was directed at a Section 2 violation and held that "the ruling complained of was harmless even if it were formally erroneous." 223 Fed., at page 886. The case reached this tribunal, and Mr. Justice Holmes likewise pointed out that there was no occasion for any election since the plaintiff had pleaded and introduced proof of only a Section 2 case (*Buckeye Powder Co.* v. *Du Pont Powder Co.*, 248 U. S. 55, at p. 61):

> "The case was fully tried upon the ground taken by the plaintiff at the outset and the only one on which it could hope to succeed. The plaintiff did not ask to amend. * * * When the plaintiff, after the ruling of the judge, went through the form of electing to rely upon acts done contrary to § 2 of the statute, it simply

adhered to the interpretation of its declaration that it had accepted at the beginning and had endeavored to sustain throughout."

None of the courts passing upon the *Buckeye case* entered any ruling in conflict with the holding of the District Court and the Circuit Court of Appeals in the instant case, that one who loses a suit for injury to his business or property may not, merely by changing the ground for claiming the injury unlawful, avoid the bar of *res judicata* and maintain a second suit for the same injury to the same business.

Petitioner next asks the Court to take jurisdiction on the theory that the ruling below is inconsistent with *United Shoe Mach. Co.* v. *United States*, 258 U. S. 451. As the supplemental opinion of the Circuit Court of Appeals (R. 82-83) indicates, however, there is no conflict between the *Shoe Machinery case* and the decision of that court or the subsequent decision of this Court in *Baltimore S. S. Co.* v. *Phillips, supra*, 274 U. S. 316.

The *Shoe Machinery cases* concerned enforcement by the Government of *public* primary rights created by statute. In the first *Shoe Machinery case*, 247 U. S. 32, this Court affirmed the ruling of the lower court that the making by defendants of the leases for the various types of shoe machinery did not constitute an invasion of the *public* primary right created by the enactment of the Sherman Law. As soon as the lower court had held that the lease could not be reached by the Sherman Anti-Trust Act, Congress, at the suggestion of President Wilson, passed legislation designed to ban such leases, *i.e.*, Congress created a new *public* right and that right was specifically designed so that thereafter the use of such leases would constitute an invasion of that new *public* right. This Court held in the second *Shoe Machinery case, supra*, that since the *public* rights were different, the Government's causes of action

were different, and neither *res judicata* nor the principle of identity of offenses applied.

Here, however, the Pontiac franchise is a *private* primary right and the same *private* primary right as was involved in the earlier suit. The invasion of that *private* primary right asserted in both cases is the cancellation of the franchise. Only the cancellation could have resulted in injury to business or property and created the cause of action, for in a treble damage suit under the anti-trust laws the gist of the action is not the conspiracy or other violation of *public* right but the impact upon or injury to the plaintiff.

> "In a civil action for damages sustained because of a conspiracy in restraint of trade, the right of recovery is not based upon the conspiracy, but upon the injuries resulting therefrom. * * * The gist of the action under this section is for injuries inflicted pursuant to the conspiracy for which the wrongdoer is liable." *Foster & Kleiser Co.* v. *Special Site Sign Co.*, 85 F. (2d) 742, 750 (cert. den. 299 U. S. 613).

Although in the present action petitioner charges a violation of Section 3 of the Clayton Act as opposed to a violation of Section 1 of the Sherman law alleged in its first suit, in both cases these charges relate merely to the reason why the act of cancellation complained of was wrongful. In both actions the private primary right asserted and the invasion of that private primary right alleged are identical. The mere fact that petitioner now claims the same act wrongful for a different reason does not change or multiply the causes of action. See Point I, *supra*.

III.

PETITIONER'S OTHER POINTS ARE WITHOUT MERIT.

In its third point the petitioner first advances excuses for losing the first case rather than reasons why, after failing to appeal from that decision, it should now be permitted to circumvent the appeal procedure by merely starting a new suit based on the same cause of action.

Petitioner claims that it did not know the reason for the cancellation of its Pontiac franchise until late in the trial of the first case. If this be true, petitioner had adequate procedures available for its protection. It could have asked for a continuance or for leave to amend its pleadings, or both. It did neither. Petitioner also had available but failed to use the discovery procedure permitted by the Federal Rules of Civil Procedure which make surprise upon a trial an impossibility. It apparently preferred to gamble upon being able to prove that the cancellation was pursuant to a Sherman Act conspiracy.

Petitioner also argues under this point that the damages sought in the two cases were different. Although identity of damages is not the test of identity of causes of action, petitioner is nonetheless mistaken. A comparison of the damages alleged in the two complaints shows that they are identical except for the formal allegation of amount. In the first suit petitioner asked damages for the following (R. 19):

> "Loss and damage in value of tools, equipment, signs, stationery and advertising materials, parts, accessories, lease, leasehold improvements, loss on inventories and fixed assets sold, loss of capital investment, loss of good will and loss of service customers, and loss of prospective profits reasonably anticipated, all to the plaintiff's damage in the sum of One Hundred Thousand ($100,000.00) Dollars."

In the second suit the items for which damages were sought were (R. 6):

> "Loss of capital investment, loss and damage in value of tools, equipment, signs, stationery, and advertising materials, parts, accessories, lease, leasehold improvements, loss on inventories and fixed assets, loss of good will, and loss of service customers, and loss of prospective profits reasonably to be anticipated, all to the plaintiff's damage in the sum of Two Hundred Thousand ($200,000.00) Dollars."

Indeed, petitioner frankly conceded before the Circuit Court of Appeals that the injury in each suit for which damages were sought was the cancellation of its Pontiac franchise. In petitioner's original brief in the Circuit Court of Appeals the following statement was made (p. 28):

> "The cause of action in the original complaint was based on the theory and the existence of the facts that the plaintiff's Pontiac franchise was wrongfully cancelled because of a conspiracy into which the defendants and others entered in violation of Section 1 of the Sherman Act; the second cause of action was based upon the theory and the existence of the facts that the plaintiff's Pontiac franchise was wrongfully cancelled because it took on a competitive line of automobiles, namely the Packard, in violation of Section 3 of the Clayton Act."

The argument that the complaint in the first suit was broad enough to justify the admissibility of proof of other damage would, even if true, be immaterial. Regardless of whether or not by reason of surplusage in the complaint in the first action, petitioner might have been able to recover damages for some conduct of respondent other than the cancellation of petitioner's franchise, the fact remains that petitioner actually sought to recover damages in the first case for the cancellation of the Pontiac franchise, and it is now seeking damages for the same cancellation of the

same franchise and for no other conduct. The only difference between the two cases lies in the ground advanced by petitioner for claiming that the cancellation was wrongful.

The same invasion of the same private primary right being involved in the instant case as in the prior case, the court below reached the correct conclusion in applying *res judicata* and affirming the *judgment* dismissing the complaint.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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October 6, 1947.

APPENDIX.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF INDIANA,
SOUTH BEND DIVISION.

F. L. Mendez & Company, *Plaintiff,*
vs.
General Motors Corporation, *Defendant.*
} No. 651 Civil.

OPINION ON MOTION TO DISMISS.

The motion to dismiss requires a determination of whether the present suit is the same cause of action as that involved in the previous suit which resulted in a verdict for the defendant. If they are identical, the judgment in the first action bars this one. *Cromwell* v. *County of Sac*, 94 U. S. 351; Restatement of the Law of Judgments, Section 63.

Mr. Justice Cardozo in *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 621, points out that a "cause of action" may mean different things depending on what the question is. The concept of a cause of action when applying the principle of *res adjudicata* is a wrongful (actionable) infringement of a right. Another definition is given in *Pavelka* v. *St. Alberts Society*, 82 Conn. 146: "a right of action at law arises from the evidence of a primary right in the plaintiff, and an invasion of that right by some delict on the part of the defendant." The question presented by this motion requires an application of this meaning of a "cause of action."

In his brief the plaintiff asserts, "Actually the basis

of the plaintiff's complaint in the former action was injury to the plaintiff because of the conspiracy entered into by the defendant and other parties which conspiracy resulted in cancellation of the plaintiff's franchise agreement and damages ensuing therefrom. Basically, the charge in the present complaint is injury caused to the plaintiff because the plaintiff entered into a franchise agreement for the sale of Packard automobiles and because the plaintiff entered into such franchise agreement, the Pontiac franchise agreement was cancelled and the damages were ensued therefrom. The former action was based on a violation of Title 15, Section 1, of United States Code and the present action is based on the violation of Title 15, Section 14, of the United States Code. It is true that the language the plaintiff uses in describing the damages suffered is substantially identical in both complaints." This statement, itself, indicates that there is but one right and but one infringement involved in the two actions. That right is the right of the plaintiff not to be injured in its property from a violation by the defendant of the anti-trust laws. Specifically, the plaintiff had a right not to have its Pontiac franchise cancelled as the consequence of the defendant's illegal conduct. The cancellation was the infringement of that right. Admittedly, there was only one cancellation, and that is the injury about which the plaintiff complains. The injury is not—cannot be—the claimed violation of the anti-trust laws which led up to the cancellation.

The plaintiff, in both actions, bases its claim on Section 15, Title 15, U. S. C. A., which in part reads: "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor * * *." Despite his argument to the contrary, the injury for which the plaintiff sues in both actions is the cancellation of its contract. From that injury it alleges

certain damages resulted. The damages (loss of business, etc.) were not the injury; they were the consequences of the injury. Likewise, the cause of plaintiff's injury is not identical with the injury for which it sues to recover. True, the alleged causes in the two suits *are* different. The plaintiff mistakenly conceives them to be its injuries (the invasions of its rights) rather than what they are, *i.e.,* the means used by the defendant in infringing plaintiff's right to be secure in its property.

The plaintiff's first action was not based on the conspiracy of the defendant with others to violate Section 2 of the Sherman Act. Instead it was based on the claimed impact of the conspiracy on plaintiff's business which led to an injury, that is, the cancellation of its Pontiac contract. Likewise in the present action the plaintiff is not suing the defendant because it violated, as claimed, Section 3 of the Clayton Act. Until a violation of that section resulted in plaintiff's injury, (again, the cancellation of its contract) it would have no cause of action regardless of the existence of the violation. By way of analogy, one has no right to sue for damages a driver of an automobile who runs a stop light unless and until he has suffered by reason of that illegal conduct.

The plaintiff strongly urges *United Shoe Machinery Corporation* v. *United States,* 258 U. S. 451, in support of its contention that this and its former suit are not identical causes of action. The case is not in point. In the two *United Shoe Machinery Corporation* cases, the Government was the plaintiff, suing for two separate violations of the anti-trust laws. The *violations* (as distinguished from any injuries to persons resulting from such violations) of the Sherman Act and the Clayton Act were the respective bases of the two suits. In other words, the conduct of the United Shoe Machinery Corporation in relation to the separate sections of the anti-trust laws

were the things litigated in those cases. No injury to a person in his business as a result of that conduct was involved under the provisions of Section 15.

In the case at bar, it is the injury to the plaintiff that is the primary issue. That same injury was the primary issue in the former action. The causes of the injury, namely, the separate alleged violations by the defendant of the anti-trust laws are secondary issues. It would be different, as in the *United Shoe Machinery* case, if the Government were prosecuting criminally or suing for an injunction under Section 3. In such case the primary issue would shift from, "Was the plaintiff *injured* in its property or business by reason of such violation?" to "Was the defendant's conduct *a violation* of the Clayton Act?"

The motion to dismiss is granted.

Enter:

LUTHER M. SWYGERT,
Judge.